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IN THE

Supreme Court of the United States

October Term, 1949

Case No. 363

LYNCHBURG TRAFFIC BUREAU,
Plaintiff-Appellant.

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees—The Interstate Commerce Commission and the Department of Justice.

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LYNCHBURG TRAFFIC BUREAU,

PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*,

DEFENDANTS-APPELLEES

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees—The Interstate Commerce Commission and the Department of Justice.

This is a direct appeal from the final decision in Civil Action 203, (District Court for Western District of Virginia, Lynchburg Division), dated June 30, 1949, of a specially constituted District Court of three judges, established pursuant to Title 28, United States Code, "Judiciary and Judicial Procedure," dismissing appellant's petition for an order enjoining, setting aside and forever annulling the report and orders of the Interstate Commerce Commission dated November 10, 1948 and January 3, 1949, reported at 273 I. C. C. 33 and 84 F. Supp. 1012.

THIS PROCEEDING

This proceeding is not complicated, as it, in simple terms, involves the question of whether or not the Interstate Commerce Commission can use its rate-fixing powers so as to pull out, from 10,143 Classification ratings, 3,500 Classification items and then give those items special and preferential treatment when such items move between points in Southern territory and points in Official territory and deny like or similar treatment of those 3,500 Classification items when such items move between points in Official territory.

The special and preferential treatment of those items for Danville has resulted in the establishment of lower-rates, mile-for-mile, at Danville than the rates formerly applicable at Danville and lower rates, mile-for-mile, to Danville than to Lynchburg. In order for Danville to enjoy the advantage of the special and preferential ratings given on the 3,500 Classification items, the Commission has authorized the carriers to give Danville free transportation service for a 64-mile haul beyond Lynchburg to Danville, as the rate to Lynchburg is authorized to be applied as the minimum rate at Danville. A charge, in the past, has been made of 9 cents in the first class rate, 8 cents in the second class rate, and 6 cents in the third class rate for the additional transportation service rendered in transporting this traffic 64 miles beyond Lynchburg to Danville. We are here seeking to have this Honorable Court to have restored, on each of the 3,500 Classification items, the former advantage Lynchburg had over Danville of 9 cents in the first class rate, 8 cents in the second class rate, and 6 cents in the third class rate.

There are 10,134 Classification ratings and, out of those ratings, 9,343 ratings were alike prior to September 1, 1940, on traffic moving between points in Southern territory and points in Official territory and between points in Official territory (262 I. C. C. 447 [469]). But, on September 1, 1940, the carriers, with the approval of the Commission, reduced 3,500 Classification ratings on traffic moving between points in Southern territory and points in Official territory and refused to establish like ratings on the 3,500 Classification items on traffic moving between points in Official territory. Consequently, we find the defendants-appellees contending that the rate to Lynchburg (on the group theory) should be the

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minimum rate at Danville, as to the 3,500 Classification items. But, on the remaining 5,843 Classification ratings, Lynchburg will continue to have her natural advantage over Danville of 9 cents, 8 cents, and 6 cents, in the first, second, and third class rates, respectively. The contention of the defendants-appellees about the group theory is arbitrary and its use here is a gross abuse of the rate-fixing powers of the Commission because how can the carriers lawfully apply the Lynchburg rate at Danville on 3,500 Classification ratings and then apply at Danville on the remaining 5,843 Classification ratings, the rate to Danville, which rate is higher than the rate to Lynchburg by 9 cents in the first class rate, 8 cents in the second class rate and 6 cents in the third class rate, without violating the provisions of the Act? Obviously, we are entitled to the relief we seek.

THE REASON FOR THIS SUIT

Prior to September 1, 1940, the Classification ratings on some 3,500 Classification items were the same on each item moving between points in Official territory, including New York, N. Y. and Lynchburg, Virginia, as the Classification ratings were on each item moving between points in Southern territory, including Danville and points in Official territory, including New York, N. Y., and on September 1, 1940, as representative, the first class rate was 120 cents, the second class rate was 102 cents, and the third class rate was 84 cents between New York, N. Y., and Danville, Virginia, and the first class rate was 111 cents, the second class rate was 94 cents, and the third class rate was 78 cents between New York, N. Y. and Lynchburg, Virginia. Prior to September 1, 1940, the Classification rating was first class on shoes, clothing, and dry goods, moving to and from Danville and New York and first class on the same articles moving to and from Lynchburg and New York. Consequently, prior to September 1, 1940, the rate on clothing, shoes, and dry goods was 120 cents between New York, N. Y. and Danville, Virginia, and 111 cents between New York, N. Y. and Lynchburg, Virginia. However, on September 1, 1940, the carriers reduced the Classification ratings on 3,500 Classification items moving between points in Southern territory, including Danville, and points in Official territory, including New York, N. Y., resulting in a reduction

in the rating on clothing, shoes, and dry goods from first class to third class between New York and Danville, but made no reduction in the ratings on the same 3,500 Classification items when moving within Official territory, including New York, N. Y., and Lynchburg, Va., consequently, the first class rating continued in effect on shoes, clothing, and dry goods moving between New York and Lynchburg. Therefore, effective September 1, 1940, the rate on shoes, clothing, and dry goods, was reduced between New York and Danville from 120 cents to 84 cents and the rate continued to be 111 cents between New York, N. Y. and Lynchburg, Virginia. Since the rate of 84 cents to Danville is less than the rate of 111 cents to Lynchburg, the rate of 111 cents to Lynchburg was authorized by the Commission to be held as the minimum rate at Danville. Therefore, on September 1, 1940, the advantage of Lynchburg, Virginia over Danville, Virginia, of 9 cents in the first class rate and 9 cents in the rates on clothing, shoes and dry goods moving from New York, N. Y., was destroyed and Danville was given the rate applicable to Lynchburg as the minimum rate at Danville, not withstanding the fact that Danville is 64 miles greater distance than is Lynchburg to and from points in Official territory located north of Lynchburg and that, class-for-class, Lynchburg is entitled to lower rates, due to distance, than Danville, Virginia.

The Interstate Commerce Act (49 USCA) provides that it is unlawful for a rail carrier to demand or collect from one person a greater or less compensation than it demands or collects from another person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic (49 USCA 2); to make, give, or cause any undue or unreasonable preference or advantage to any particular person, locality, territory, or gateway or any particular description of traffic, in any respect whatsoever, or to subject any particular person, locality, territory, or gateway or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (49 USCA 3); and to charge more for a shorter haul than for a longer haul over the same route (49 USCA 4).

Therefore, since the rail carriers did establish, on September 1, 1940 (special rates) more favorable Classification ratings on traffic moving between Southern territory, including Dan-

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ville, Virginia, and points in Official territory, including New York, N. Y., than the Classification ratings they maintained on the same articles moving between points in Official territory, including movement between New York, N. Y., and Lynchburg, Virginia, and since they did give undue and unreasonable preference or advantage to points in Southern territory, including Danville, over points in Official territory, including Lynchburg, Virginia, which preference and special rates caused lower charges to be established for longer hauls than for shorter hauls, and since such rates and ratings are declared to be unlawful by the provisions of Sections 1, 2, 3, and 4 of the Act (49 USCA 1, 2, 3, 4) and since such unlawfulness is admitted by the Commission in its effort to mitigate the unlawfulness by the observance of the rate to Lynchburg as the minimum rate at Danville, we raise the question, among others, of whether or not, under the law, the Interstate Commerce Commission can use its rate-fixing powers, as it has done here, so as to build up one community (Danville) and destroy another community (Lynchburg), and whether or not legal relief can be had by the community suffering from the special or preferential Classification ratings given the preferred community.

The rate-fixing power of the Commission is being used to give shippers between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., *transportation service on* 3,500 *Classification items on more favorable terms and conditions than the terms and conditions* the Commission has provided on the same 3,500 Classification items for shippers within Official territory, including Lynchburg, Virginia and New York, N. Y. By these statements, we mean that the Commission has approved Classification ratings, as an example, on traffic moving between Danville and points in Official territory which have the effect of giving Danville *free transportation service beyond Lynchburg to Danville*, because instead of charging Danville 9 cents, 8 cents, and 6 cents in the first, second and third classes, respectively, more from and to New York, than they charge at Lynchburg from and to New York on the same traffic, the Commission has authorized the carriers to make *no charge* for the transportation service rendered in transporting this same traffic 64 miles beyond Lynchburg to Danville.

The Commission has recognized that Danville and Lynchburg as entitled to different rates on each class, as the Commission in *North Carolina Corporation Commission* v. *A. C. & Y. R. R.*, 213 I. C. C. 259; in *Eastern Class Rate Investigation*, 164 I. C. C. 314; and in *Class Rate Investigation*, 1939, 262 I. C. C. 447, prescribed a mileage scale of rates to Danville, Virginia and to Lynchburg, Virginia, for application to and from points in Official territory, including New York, N. Y. In the Carolina Case, for rate-making distance (meaning the short-line distance) of 465 miles between New York and Danville, the Commission prescribed a first class rate of 120 cents, including increases under Ex Parte 123, and prescribed a first class rate of 137 cents in the *Class Rate Investigation Case*, 262 I. C. C. 447, and for the rate-making distance (meaning the short-line distance) of 401 miles between New York, N. Y. and Lynchburg, Virginia, the Commission prescribed between New York, N. Y. and Lynchburg, Virginia, a first class rate of 111 cents in the *Eastern Class Rate Case*, 164 I. C. C. 314, including increases under Ex Parte 123, and prescribed a first class rate of 128 cents in the *Class Rate Investigation Case*, 262 I. C. C. 447. Consequently, it is obvious from those decisions of the Commission that class-for-class, Lynchburg, Virginia is lawfully entitled to lower charges on every shipment than the charge applicable at Danville on the same shipment. The aforesaid decisions rebut any assumption that Lynchburg and Danville should be grouped and that the rate to Lynchburg should be the minimum rate at Danville. The aforesaid decisions raise the presumption that the rate to Lynchburg will be the minimum rate at Danville *only by giving Danville more favorable Classification ratings than those given Lynchburg* and that is exactly what has happened here, as the carriers have given Danville 3,500 reduced Classification ratings and withheld those ratings from Lynchburg, resulting in a first class rating at Lynchburg and a third class rating at Danville on such articles as shoes, clothing, and dry goods.

The report of the Commission shows, at sheet 41 of 273 I. C. C. 33, the following:

> "A comparison of rates under the proposed adjustment between representative points in Central and Southern territories shows that, class for class, no difficulties are

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> experienced with the proposed hold points but when comparing so-called mismatched classes, for example, third class in Southern and first or second in Official, minimum charges on less-than-carload and any-quantity traffic, as well as on carload traffic, are necessary."

Consequently, it is clear from the decision of the Commission that the 3,500 reduced Classification ratings created the necessity for minimum rates.

This suit is necessary to determine whether or not the Commission can lawfully approve more favorable Classification ratings (mismatched classes) on traffic moving between points in Official territory and points in Southern territory than the Classification ratings maintained on the same traffic moving between points in Official territory, when, as here, the more favorable rating (mismatched classes) has resulted in the complete destruction of the natural rate competitive relationship of Lynchburg over Danville and has placed Danville in a more favorable (unnatural) position to grow at the expense of Lynchburg simply because giving Danville 3,500 reduced Classification ratings and withholding the same ratings from Lynchburg has unduly preferred Danville, and will continue to prefer Danville, at the expense of Lynchburg. We think the Commission cannot use its permissive powers under Section 15(1) of the Act to sanction preference and close its eyes with respect to the mandatory provisions of Sections 1, 2, 3 and 4 of the Act, which apparently has happened when the Commission permitted the carriers to create unjust discrimination, undue preference and prejudice and fourth-section departures by the establishment of 3,500 reduced Classification ratings for Danville and withholding the same ratings from Lynchburg.

In *Portland R. L. & P. E. v. Railroad Commission* (229 U. S. 397), 33 S. Ct. 820, at page 826, the following appears:

> "If the state may not thus legislate as to its domestic corporations, they, by merely arbitrary action, may so exercise their rate-fixing power as to build up one community and destroy another, and prevent that equality of treatment which it has been the object of many statutes of this kind, passed under state and Federal authority, to secure."

The action of the Commission in permitting more favorable Classification ratings for one territory or city and the denial of like ratings to another territory or city, destroys that equality of treatment guaranteed by the Interstate Commerce Act (49 USCA) and the action of the District Court in affirming the report and orders of the Commission is contrary to law.

REPEAL OF THE INTERSTATE COMMERCE ACT

The appeal should be granted and, after full hearing by this Honorable Court, the order of the District Court should be reversed, because the Court would permit the Commission to use its rate-fixing powers so as to give special rates to particular shippers of 3,500 Classification items in that more favorable Classification ratings are given shippers of those articles when those articles move between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., than the Classification ratings the Commission gives shippers of the same articles when the articles move between points within Official territory, including Lynchburg, Virginia and New York, N. Y. (see 49 USCA 2).

The appeal should be granted and, after full hearing by this Honorable Court, the order of the District Court should be reversed because the District Court would permit the Commission, contrary to the mandatory provisions of the Act (49 USCA) to use its permissive rate-fixing power under Section 15(1) of the Act, so as to create and continue undue preference for shippers in Southern territory, including Danville, Virginia and create and continue undue prejudice of shippers in Official territory, including Lynchburg, Virginia and New York, N. Y., and to permit the carriers to establish ratings that create departures from the long-and-short-haul clause of Section 4 simply by permitting the carriers to establish more favorable Classification ratings on 3,500 Classification items when those items move between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., than the Classification ratings the carriers provide on the same 3,500 Classification items when those items move between points within Official territory, including Lynchburg, Virginia and New York, N. Y. (see Sections 3 and 4, 49 USCA 3 and 4).

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Not withstanding the contention that the adjustment the Commission approved in this proceeding and the alleged grounds offered in support of the orders of the Commission, which the District Court affirmed, the true fact remains that prior to September 1, 1940, the Classification ratings on these 3,500 Classification items were the same on traffic moving between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., as were the Classification ratings on the same 3,500 Classification items when moving between points in Official territory, including Lynchburg, Virginia and New York, N. Y. In other words, prior to September 1, 1940, the rate on shoes, clothing, etc., was 120 cents per one hundred pounds at Danville, Virginia and 111 cents per one hundred pounds at Lynchburg, Virginia, on shipments moving to and from New York, N. Y. But, on September 1, 1940, the rate of 120 cents at Danville was reduced to 84 cents and the rate at Lynchburg of 111 cents continued in effect to and from New York, N. Y. The Commission has used its rate-fixing powers in a way so as to take away from Lynchburg, Virginia, her natural advantage over Danville, Virginia, of 9 cents per one hundred pounds on shipments of shoes and on approximately 3,500 other items moving to and from New York, N. Y., including also all points in Official territory, simply by changing the Classification ratings on these 3,500 items so as to give Danville lower Classification ratings than those given Lynchburg.

If the Commission can use its rate-fixing powers so as to give special ratings to one territory or community and withhold the same ratings from another territory or community, then the provisions of Sections 2, 3, and 4 of the Act (49 USCA 2, 3, and 4) have been repealed. If special rates, undue preference, and undue prejudice and fourth-section departures can be approved rather than removed simply by holding that the special rates, undue preference and undue prejudice and fourth-section departures created by the establishment of 3,500 reduced Classification ratings to Danville can be sanctioned and the unlawful rates continued in effect under the permissive powers of the Commission contained in Section 15(1) of the Act (49 USCA 15(1)), then Sections 1, 2, 3, and 4 of the Act (49 USCA 1, 2, 3, 4) have been repealed.

FREE TRANSPORTATION SERVICE

The Interstate Commerce Commission is using its rate-fixing powers so as to create inequalities in ratings and charges on traffic moving between points in Official territory, including New York, N. Y. and Lynchburg, Virginia, on the one hand, and traffic moving between points in Official territory, including New York, N. Y., and points in Southern territory (including Danville, Virginia) on the other, and then defending its action on the grounds that it has the authority, under Section 15(1) of the Act (49 USCA 15(1)) to give Danville *free transportation* for 64 miles beyond Lynchburg, Virginia, by permitting the carriers to charge at Danville the rate to Lynchburg as the minimum rate at Danville. In other words, prior to September 1, 1940, the rate was 120 cents per one hundred pounds on shoes from New York to Danville and 111 cents per one hundred pounds on shoes from New York to Lynchburg, but the Commission has now authorized the carriers to reduce the rate on shoes from 120 cents to 111 cents from New York to Danville and the District Court has sustained the Commission. Therefore, since Lynchburg must pay transportation charges based upon the actual rate-making distance from origin to Lynchburg and since Danville had to pay transportation charges, prior to September 1, 1940, based upon the actual rate-making distance from origin to Danville, the granting to Danville and other points in Southern territory transportation service at the same charge made at Lynchburg spells out *free transportation service* or *favoritism*, as Lynchburg is required to purchase transportation service based upon the actual rate-making distance from origin to Lynchburg but Danville is authorized to purchase transportation service on those 3,500 Classification items based on the rate to Lynchburg, thus making no charge for the 64 miles additional haul beyond Lynchburg to Danville.

In *Class Rate Investigation*, 1939, 262 I. C. C. 447, at page 469, it is shown that points in Southern territory, including Danville, and points in Official territory, including Lynchburg, purchased transportation service on the same terms and conditions with respect to Classification ratings in 9,343 instances out of 10,134 ratings. In other words, equality in Classification ratings existed between Danville and points in Official

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territory, on the one hand, and Lynchburg and points in Official territory, on the other, in every instance out of 10,134 ratings except 791 ratings (262 I. C. C. 447 (469)). However, on September 1, 1940, that equality in Classification ratings was changed by the reduction in the Classification ratings on 3,500 Classification items (273 I. C. C. 33 (35)), on such items moving to and from Danville and those ratings were withheld from Lynchburg. Consequently, the equality in ratings between Danville and Lynchburg was reduced from 9,343 ratings to 5,843 ratings, or lack of equality was increased from 791 ratings to 4,291 ratings. We hope there is no man-made law that will permit any Commission or carrier to use its rate-fixing powers so as to build up communities in Southern territory and to destroy communities in Official territory by giving preference and favoritism in the form of Classification ratings to shippers in Southern territory, including Danville, Virginia, on traffic moving to and from points in Official territory, and withholding like Classification ratings on the same traffic moving within Official territory. Holding that the Commission can use its rate-fixing powers so as to give favoritism to Danville with respect to the Classification ratings on 3,500 Classification items is a holding unsupported by any law that we have been able to find. Consequently, we are here respectfully requesting this Honorable Court to hear us and to bring order out of the chaos the orders in 273 I. C. C. 33 have created.

UNJUST DISCRIMINATION

Section 2 of the Act (49 USCA 2) provides, in substance, that if the Southern Railway, Norfolk and Western Railway, or Chesapeake and Ohio Railway or the other carriers in Official territory shall directly or indirectly, by special rates (Classification ratings on 3,500 Classification items) demand or collect from shippers at Lynchburg a greater compensation (mile for mile) for any service rendered (transporting shoes) than it demands or collects from shippers at Danville for doing for him (transporting shoes) a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such a carrier is guilty of unjust discrimination.

The record shows that the circumstances and conditions prior to September 1, 1940, required that Danville pay 9 cents per 100 pounds more than Lynchburg should pay for transportation service rendered in connection with the transportation of shoes from New York. The record shows that Lynchburg is now required to pay greater compensation (mile for mile) than Danville is required to pay for like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The record, we believe, adequately shows that the Commission is using its permissive authority, under Section 15(1) of the Act so as to continue in force rates and charges that create unjust discrimination. Consequently, the order of the Commission should be set aside and appropriate relief granted.

PERMISSIVE vs. MANDATORY

The District Court, in affirming the orders of the Interstate Commerce Commission, did not give appropriate consideration to the fact that those orders were issued under the permissive provisions of Section 15(1) of the Act rather than being issued under the mandatory provisions of the Interstate Commerce Act (49 USCA). The difference between the permissive provisions of the Act and the mandatory provisions of the same Act is that the Commission is free to act under the permissive provisions of the Act only to the extent that those acts are not contrary to the mandatory provisions of the Act.

The mandatory provisions of the Act require that all charges *shall* be just and reasonable; that it *shall* be unlawful for undue preference or prejudice to exist and that it *shall* be unlawful to charge or receive a greater compensation for a shorter haul than for a longer haul (49 USCA 1(5), 3 and 4), and the permissive provisions provide that should the Commission, upon complaint or upon its own motion, find rates, ratings, or charges unlawful, that the Commission is authorized and empowered to determine and prescribe just and reasonable rates or the maximum or minimum or the maximum and minimum rate to be charged. In the exercise of the permissive authority, the Commission has approved more favorable Classification ratings for Danville than for Lynchburg on 3,500 Classification items. These favorable Classification ratings resulted in undue

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preference and prejudice, unjust discrimination and departures from the provisions of the long-and-short-haul clause of Section 4, which favorable Classification ratings are the reason for applying the rate to Lynchburg as the minimum rate at Danville.

It is our contention that Section 15(1) of the Interstate Commerce Act (49 USCA 15(1)) cannot be interpreted and used by the Commission so as to have the effect of actually repealing Sections 1, 2, 3, and 4 of the Act (49 USCA 1, 2, 3, 4), and we here call upon this Honorable Court to determine whether or not the Commission can use its permissive powers so as to repeal the Commerce Act. In other words, if the action of the Commission, as affirmed by the District Court, is correct, then the mandatory provisions of Sections 1, 2, 3, and 4 must give way to the permissive provisions of Section 15(1) of the Act. The mandatory provisions of the Act require that lawful charges shall apply at Lynchburg as well as at Danville, and since a distance of 64 miles separates Lynchburg from Danville and, since for that distance the Commission has, under the mandatory provisions of the Act, prescribed a lawful difference between Lynchburg and Danville of 9 cents in the first class, 8 cents in the second class, and 6 cents in the third class rates on all traffic moving to and from New York, N. Y., undue preference and undue prejudice will be created if the Commission, by its permissive power, takes away from Lynchburg its natural advantage over Danville. Consequently, the provisions of Section 15(1) of the Act are being used to nullify the Act and to defeat the purpose of the Commerce Act because favoritism is granted Danville in the form of more favorable Classification ratings. In *T. M. Kirkpatrick* v. *Illinois Central RR Co.*, 135 A. L. R. 607, at page 609, the following appears:

> "The outstanding purpose of the commerce act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme, or device they may be sought to be accomplished."

We believe that the purpose of the Commerce Act was to uproot and destroy all discrimination and, holding that belief, we are unable to understand why the Commission has per-

mitted the carriers to discriminate against Lynchburg by giving Danville more favorable Classification ratings on 3,500 Classification items than the ratings given Lynchburg on the same 3,500 Classification items. We respectfully submit that the permissive orders of the Commission giving the carriers the right of applying the rate to Lynchburg as the minimum rate at Danville on the 3,500 Classification items is unlawful, as that order takes away from Lynchburg her natural advantage over Danville of 9 cents, 8 cents and 6 cents, in the first, second, and third classes, respectively, and that order continues rates and charges that create unjust discrimination, undue preference and undue prejudice. Consequently, we are here requesting this Honorable Court to decide whether or not the Commission can fix Classification ratings and rates under the permissive provisions of Section 15(1) of the Act (49 USCA 15(1)) so as to have the effect of actually repealing Sections 1, 2, 3, and 4 of the Interstate Commerce Act (49 USCA 1, 2, 3, 4).

CONCLUSION

In the motion to affirm, filed by the defendants-appellees, the following appears:

> "For example, the first class rate on shoes from New York to Lynchburg is 111 cents per one hundred pounds, while the first class rate from New York to Danville is 120 cents per one hundred pounds. The result of the exceptions to the Southern Classification already described, was that the first class 120-cent rate to Danville was reduced to a third class 84-cent rate on shoes. The official territory lines did not take similar action so that the Lynchburg rate remained at 111 cents. *An obvious inequality to Lynchburg resulted. The Commission remedied this by prescribing as minima equal class rates to each locality and placed them in a rate group for this purpose.*" (S. 5) (Emphasis added).

Here, even the defendants-appellees admit that "an obvious inequality to Lynchburg resulted" from the establishment of the 3,500 reduced Classification ratings and they further show that Lynchburg is entitled to lower rates than Danville. But, they say that this obvious inequality to Lynchburg can be remedied by prescribing, as minima, equal class rates to Dan-

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ville and Lynchburg and by placing both points in the same rate group. The fixing of equal rates at Danville and Lynchburg and the grouping of those points in the same rate group is unlawful because equal rates at Danville and Lynchburg and the grouping of those points in the same rate group results in giving Danville free transportation service beyond Lynchburg contrary to the rates prescribed by the Commission in 213 I. C. C. 259, 164 I. C. C. 314, and 262 I. C. C. 447, and is a gross abuse of the permissive rate-fixing powers of the Commission. The Commission is using its permissive power under Section 15(1) of the Act (49 USCA 15(1)) so as: (1) to give Danville *free transportation service* on traffic subject to the 3,500 reduced Classification ratings as no charge is made for transporting such traffic an additional distance of 64 miles beyond Lynchburg to Danville; (2) to give Danville special and preferential Classification ratings on 3,500 Classification items; (3) to withhold from Lynchburg the same Classification ratings given Danville on the same 3,500 Classification items; (4) to repeal the mandatory provisions of Sections 1, 3, and 4 of the Act (49 USCA 1, 3, 4); and (5) to continue the unjust discrimination, undue preference and prejudice created by the establishment of the 3,500 reduced Classification ratings.

Inasmuch as Lynchburg first had a natural advantage over Danville on these 3,500 Classification items, we submit that such advantage cannot now be taken away from Lynchburg without creating undue prejudice and unjust discrimination. Nor can Danville be given equal rates with Lynchburg unless there is no difference between the cost of rendering the service to Danville and the cost of rendering the service to Lynchburg on these 3,500 Classification items (see *U. S.* v. *Illinois Cent. R. Co.*, 263 U. S. 515). Since there was a difference in the cost of the service prior to September 1, 1940 on these 3,500 Classification items and since there is a difference in the cost of the service on the other 5,843 Classification items, and since the report of the Commission does not show that the favorable Classification ratings given Danville on the 3,500 Classification items are justified by the cost of rendering the service, the orders are unlawful.

The use of the permissive power under Section 15(1) so as to give Danville an unnatural advantage over Lynchburg on 3,500 Classification ratings cannot be considered proper or

lawful, since on 5,843 Classification ratings, Lynchburg retains her natural advantage over Danville of 9 cents, 8 cents, and 6 cents in the first, second, and third classes, respectively, to and from New York. Therefore, if it is lawful for Lynchburg to have an advantage over Danville on 5,843 Classification ratings, formerly on 9,343 ratings, and to have, class for class, lower rates than Danville (213 I. C. C. 259, 262 I. C. C. 447, and 164 I. C. C. 314), then it is unlawful for Danville to have lower Classification ratings than Lynchburg and to have the same rate as the rate to Lynchburg on the 3,500 Classification ratings.

In this proceeding, we have used Danville and Lynchburg as representative of the conditions created at all points located on the border of Southern Classification territory and Official Classification territory by the establishment of the 3,500 reduced Classification ratings. This suit is directed at and includes the entire report and orders entered by the Commission in 273 I. C. C. 33.

The motion to affirm should be overruled and this Honorable Court should decree the relief sought by plaintiff-appellant, and we so pray.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU.

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October 3, 1949.

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